Office-Supreme Court, U.S.
FILED
FEB 9 1965
JOHN F. DAVIS, CLERK

No. 894

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ROBERT HARTGRAVES,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JULIUS LUCIUS ECHELES
and
WARREN WOLFSON
30 North LaSalle Street
Chicago 2, Illinois
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Robert Hartgraves respectfully prays that a writ of certiorari be issued to the Supreme Court of Illinois to review its decision affirming a judgment of conviction in the Criminal Court of Cook County, Illinois adjudging petitioner guilty of the crime of arson and sentencing him to a term of four to eight years in the penitentiary.

In advance of the trial to a jury, petitioner filed his motion to suppress the confession and a hearing was held thereon. The court held the confession to be proper against the contentions of the defendant that it was secured in violation of petitioner's constitutional right to be advised that he did not have to make any statements and contrary to petitioner's further contentions that he was beaten and threatened.

OPINION BELOW

The judge who held the hearing on the petitioner's motion to suppress the evidence denied the motion.

The opinion of the Supreme Court was first handed down on September 29, 1964 (R. 4).[1] Upon Petition for Rehearing (R. 12), the opinion was modified upon the denial thereof on November 23, 1964 (R. 13) and is reported, as modified, in 31 Ill. 2d 375. It is also printed in this Petition as Appendix "A"

JURISDICTION OF THIS COURT

1. The date of judgment sought to be reviewed was entered on November 23, 1964, when the petition for rehearing was denied (R. 13). This petition for a writ of certiorari is filed within ninety days from said denial.

2. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(3) and Rule 22(1) of the rules of this court.

QUESTIONS PRESENTED FOR REVIEW

1. May a confession properly be admitted against a defendant who was not advised of his right to counsel by the police and who was not advised that what he said might be used against him in a subsequent legal proceeding?

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[1] "R" refers to certified Record as filed in this court.

2. Is the Illinois court correct in reading *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. ed. 2d 977, as not ". . . requiring the rejection of a voluntary confession because the State did not affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt," when this court has affirmatively stated to the contrary?

3. Where Illinois has interpreted this court's *Escobedo* decision differently from Oregon (*State* v. *Neely*, Sup. Ct. Ore.,—Oregon—395 P. 2d 557, Sept. 30, 1964) and from California (*People* v. *Dorado*, 40 Calif. Reptr. 264, 394 P. 2d 952, Sept., 1964) ought not this court take jurisdiction in order to set out more clearly its holding in *Escobedo* as a guide to all of the State tribunals?

4. Where the evidence is vague and uncertain as to whether defendant was permitted to make a phone call upon his request in advance of his confession and where the evidence of beating, threat and promise is clear, should a confession obtained be permitted into evidence?

CONSTITIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.

In advance of his arson trial defendant filed his verified petition to suppress the confession and a hearing was held thereon. The court denied the motion, admitted the confession, the case went to the jury and the defendant was convicted and sentenced. Without the evidence of the confession, there were no facts upon which a conviction could be had.

EVIDENCE ON BEHALF OF DEFENDANT IN CONNECTION WITH THE MOTION TO SUPPRESS

The verified petition of defendant to suppress the confessions was made in advance of trial and a hearing was held thereon (A. 3-34).[1] The defendant testified he was 26 years old, completed one year high school, was married and had two children. He was arrested by three police officers at about 9:00 or 10:00 P.M. on May 16, 1962. Two years prior he was in an automobile accident and had an operation on his right shoulder and had steel wires in it. His left arm had a cut with four stitches in it. At the time of his arrest the cut was not bothering him. When he left the police automobile, an officer got in back of him and twisted his right arm up. He told the officer he had an injury and asked him not to twist the arm because he couldn't stand it being twisted. They shackled his hands behind him and took him to the police station (A. 3).

He was not allowed to use the telephone by the detectives in the interrogation room (A. 4). During the interrogation they asked him if he lit the fire and he denied it. A couple of hours later they removed his handcuffs (A. 4). He was questioned continuously from the time he was brought

[1] "A" refers to printed Abstract of Record as filed in Supreme Court of Illinois.

to the station until 1:30 in the morning when he signed a confession (A. 4-5). Someone came into the room and told him that if he didn't confess they were going to throw him in a cell with a bunch of crazy dope addicts (A. 4). An officer twisted his arm in back of him and they bumped up against the cut he had on his left arm and as a result it started bleeding. When his arm was twisted behind him he had pain in his right shoulder (A. 4). One heavy-set detective told him that he wouldn't have to worry about his shoulder any more if he didn't sign the statement (A. 5). A short detective told him that he would make it so miserable for his wife that she would not be able to find a job anywhere to support his child, and his child would go to a home (A. 5). He was not given anything to eat or drink although he saw Johnny Owens and Marge Helmer (two potential state's witnesses) sitting in the next room eating sandwiches and drinking milk shakes (A. 5).

He asked for permission to make a phone call to his wife. The detective told him he could not make a phone call, but that after he was booked, he could then make a phone call (A. 5).

At the time he signed the statement he was nervous, he couldn't think straight, both arms were hurting him, he had no water and his throat was dry. The detectives kept reminding him about his wife and child. His wife was pregnant at that time and the detectives said that they would bother her constantly (A. 5). After he signed the first statement, he was then questioned by an assistant State's Attorney in another room. While he was being questioned he was shown statements made by John Owens and Marge Helmer (A. 6). The statement he signed was not true (A. 6). He later made a statement containing much the same information as the first statement at about

10:00 or 11:00 o'clock in the morning (A. 6). He complained to the assistant State's Attorney that his left arm was bleeding and asked if they could take care of it and get some bandages. A doctor was called to attend to his wound (A. 6). He had received the wound three days before at work and the wound had been stitched up. It was caused to bleed by the detectives who pushed him around and bumped his arm (A. 6). He had not been allowed to make any phone calls up to the time of the second statement, although he made requests so to do. "I wanted to call somebody to get a representative, somebody to talk for me. They wouldn't let me talk—" (A. 6). He did not tell the assistant State's Attorney that his prior statement was not true because the two detectives had warned him that if he mentioned anything other than the statement that he gave that they would take care of his wife and kid (A. 6). When he was released on the following day on bond he sought medical attention from his family doctor who treated him for nerves, for the cut on his arm and for his right shoulder (A. 7).

Muriel Hartgraves, wife of the defendant, testified she was a secretary to the admitting officer at Presbyterian-St. Luke's Health Center. Before her husband was arrested, his shoulder injury had not been bothering him. When she saw her husband on the day he was released on bond she noticed that the bone in his right shoulder was sticking up just above where the incision was made. She and her husband went to the doctor (A. 10).

Dr. Herbert Shermer testified he had treated the defendant after an automobile accident in 1959 for a separation of the right shoulder joint. An operation had been performed in which separate bones were pinned together and wires were attached around them. He saw the defendant on May 18, 1962, in his office. Defendant complained he

was nervous, upset and had pain in his right shoulder. The pain was in the same location where the operation took place. The type of injury which the defendant had would cause pain if pressure were put upon the shoulder. He gave the defendant an injection, prescribed sedatives and recommended heat for the shoulder joint (A. 11).

EVIDENCE FOR THE STATE ON THE MOTION TO SUPPRESS THE CONFESSION.

Detective John Weiss said that he and detective Wilkins arrested the defendant at about 11:00 P.M. on May 16; that defendant was not handcuffed at that time; that defendant walked to the squad car and was taken to the police station where defendant was interrogated; that he did not threaten the defendant nor did he tell the defendant that his child would be taken away from him or that something would happen to his wife; nor did the witness touch, beat, hit or strike the defendant or grab his left arm. He did notice some stitches on defendant's arm at the time of taking a written statement (A. 12). Defendant asked to make phone calls after the oral questioning (A. 12). After the oral questioning the defendant gave a written statement. Previous to the written statement defendant was shown the statement taken away from Johnny Owens; also parts of a statement given by Margie Helmer were read to him. When defendant was first told that Owens and Helmer had stated that he was the one who started the fire defendant said, "They are both liars" (A. 13). During the time the defendant was being questioned and during the written statement the witness noticed the defendant's left arm was bleeding. He examined the wound and called Dr. Rose of the police department. The wound was a bit festered and Dr. Rose came over, cleaned up the wound and put a bandage on it (A. 14). The written statement was signed at about 3:30 or a quarter to

4:00 in the morning. Up to this time the defendant had asked to make phone calls and he was permitted to make a phone call. "I don't know whether he called his wife—I'm pretty sure he called his wife from the police building." (A. 14).

> "Q. At any time had you suggested any answers that he make in statements that he would give to the police or State's Attorney?
>
> A. Well, he wanted to know what the outcome would be. We asked him if he had a record. He said no, he never had no record. So he asked us if he had to get an attorney, and we advised him that it would be advisable to get an attorney, yes." (A. 16).

On cross examination, officer Weiss testified when the defendant was arrested he was handcuffed with his hands in front of him (A. 16). The defendant was taken to an interrogation room at the Central Police Station. There were two telephones in the room. The officer was with the defendant constantly and never left the room. During that time the defendant made a phone call after the statement was taken (A. 17).

> "Q. Did you tell him before he made the statement he could use the phone if he wishes?
>
> A. No, I did not. In fact he didn't ask." (A. 17).

From the time the defendant entered the office until the time the written statement was taken, the defendant never got out of the chair. When the officer explained to the defendant that Margie Helmer and Johnny Owens made a statement about the fire, the defendant called them a bunch of liars (A. 18). The officer brought Owens to defendant's presence. From the start, the defendant refused to make a statement (A. 18).

> "Q. Did you tell him it would go easier on him if he made a statement?

A. It would be easier on him if he did make a statement if he was involved in it, yes.

Q. Did you tell him you might try to help him in court if he made a statement?

A. We do everything we can, because he said he had no record and never been arrested before.

• • •

Q. You knew it was true that he had never been arrested before; you checked his record?

A. We checked the record, yes.

Q. You knew that he hadn't been arrested before.

A. That's right.

Q. And you told him it would go easier for him in court if he made a statement.

A. Well, we did, yes." (A. 18-19).

Between the time of defendant's oral statement and written statement officer Weiss left the room in order to book the prisoner. When he left the room, detective Wilkins was with the defendant. There were stenographers on duty in the building, but they were not called to take the written statement. His partner, detective Wilkins took the statement. At no time during the taking of the written statement did he tell the defendant that the defendant did not have to answer questions if he did not want to (A. 19).

He called the police doctor at about 10:00 o'clock in the morning because the defendant's arm looked as though it was festering. It was yellow-looking (A. 19). On the morning of May 17, a weekday, there were four courtrooms in session in the building where the defendant was being interrogated, but no one took the defendant before any judge. They were still in the process of questioning (A. 19). The defendant was in the arson unit office until

about 7:00 o'clock in the morning and then went back to the lock-up for several hours. At about 9:30 A.M., the officer got the defendant from his cell and took him to where the press was in order that the press could take television and movie pictures of the defendant (A. 20).

Between the defendant's oral statement and his first written statement, the defendant asked, "Will I need a lawyer?" and the witness said, "Yes, I think you will." (A. 20). The witness did not offer to let the defendant use the phone to call a lawyer. After the oral statement, the defendant said he was worried about his wife because she was going to have a baby any day; and he also told the witness he was concerned about what might happen to his other child (A. 20-21).

Dr. Louis Rose, a police department physician, testified he was summoned at 10:00 A.M. on May 16, 1962, to clean a sutured wound on defendant's arm and change the dressing. The wound was not bleeding when he saw it. There were five stitches in the wound (A. 21).

Assistant corporation counsel John Thornton testified he saw the defendant at 8:00 o'clock in the morning on May 17, 1962 in the office of an assistant State's Attorney and that while he was there for five minutes nobody in his presence threatened or beat the defendant; nor did the defendant complain to anybody that he was beaten (A. 22).

An investigator for the National Board of Fire Underwriters, Frank Grady, testified he saw the defendant on May 17, 1962 in the police interrogation room at about 1:00 A.M.; the defendant was sitting at a desk talking to detectives Weiss and Wilkins and to fireman Carl Scheel.

While he was in the room during the questioning he did not hear anyone threaten or strike the defendant; nor did he hear anyone say that defendant's child would be taken from him or that anything would happen to his wife (A. 23). While defendant was being questioned, defendant was shown the statements of Marge Helmer and John Owens. When the defendant signed the statement defendant was not threatened in any way nor was defendant promised any immunity (A. 23-24). The witness was present in the assistant State's Attorney's office in the police building some time after 8:00 o'clock in the morning when defendant signed another statement. He did not see anyone strike or threaten the defendant in any way. He did notice a cut on defendant's arm which was festering in some way (A. 24).

He noticed the defendant's left arm was cut shortly after defendant arrived at the police station at about 12:30 or 1:30 in the morning when defendant was brought in by the police officers. There appeared to be a couple of stitches on defendant's arm which appeared to be festering, by which he meant "swollen" and maybe a little pus on the wound. At that time nobody made any attempt to get a doctor for Hartgraves (A. 25). When he was in the interrogation room between midnight and 2:00 A.M. in the morning on May 17 he did not hear any mention of the word attorney, nor did he see defendant make any phone calls.

Detective George Wilkins testified he arrested the defendant about 11:00 P.M. on May 16. The defendant "voluntarily" accompanied him to the squad car. Defendant was handcuffed at that time (A. 26). Neither on the way to the police headquarters nor in the interrogation room did anyone threaten the defendant, twist his arm or hit his shoulder; nor did anybody threaten to do anything with respect to defendant's wife or child.

The defendant had a laceration on his left arm about two inches which looked infected (A. 26). After the defendant was questioned by officer Weiss and after a written statement was taken and after defendant was taken to the scene of the fire for a re-enactment and after defendant was taken back to police headquarters at 10:00 o'clock in the morning a doctor examined the defendant and bandaged the arm. The witness was present when an assistant State's Attorney took another statement from the defendant after 10:00 o'clock in the morning, which was never signed. Previous to the statement given to the assistant State's Attorney, defendant had not been threatened or physically hit or punched by anybody in his presence; nor did defendant complain of any injury to his left arm (A. 27).

On cross examination the witness said that when Hartgraves was arrested he handcuffed the defendant to his partner Weiss and that Hartgraves and Weiss walked to the squad car as they were cuffed together (A. 28).

Before the defendant made his oral statement there was some mention made of the defendant's wife being pregnant (A. 29).

The witness could not say whether officer Weiss promised the defendant anything for making his oral statement because he was not in the room during the time when Weiss had the conversation alone with the defendant (A. 30).

Isabel Byrnes and Jerome Miller, testified that when they saw defendant during the time he was being interrogated by Mr. McCarthy, they did not see anybody hit or threaten the defendant nor did the defendant complain about any injuries. This was some time around 11:00 A.M. on May 17, 1963 (A. 30-31).

Fireman Carl Scheel testified that he assisted in the questioning of the defendant at police headquarters on May 17, 1962, and he did not see anybody strike the defendant nor did he hear anybody threaten the defendant or induce him to give a statement. He did notice the wound on defendant's left arm when they first arrived at police headquarters (A. 31).

Former assistant State's Attorney Daniel McCarthy testified he saw the defendant at about 11:15 on the morning of May 17, 1962 and during that time defendant made no complaints, nor did anybody threaten the defendant or induce him to make a statement in his presence. During the questioning defendant indicated he would be willing to sign a statement, but when the witness later asked the defendant to sign the statement, defendant stated he had employed counsel and declined to sign it (A. 32). (The witness asked the defendant to sign the statement the next day, on May 18, by which time the defendant had counsel.)

Marjorie Helmer testified for the state that she saw the defendant put in the police car and she rode to the police station in the same car. Nobody struck or abused the defendant on the way to the police station. She was in an adjoining room at the police station when the defendant was being questioned and she did not hear him questioned nor did she see him abused or struck.

> "Q. And did you hear anyone threaten to have his child taken from him?
>
> A. No. The only thing he did ask is to call his wife because she was pregnant at the time." (A. 32-33; R. 318).

After defendant left the police station in the company of officers and then returned, she noticed the defendant had a cut on his left arm, ". . . but they bandaged it right before they brought him in." (A. 33; R. 321).

On cross examination, Mrs. Helmer testified that when the police put the defendant in the car, they did not handcuff him; officer Wilkins took the defendant by the elbow and they walked to the car. Then the defendant was handcuffed. While she was in the adjoining room and heard defendant being interrogated, she heard him ask for permission to call his wife because his wife was pregnant and the witness thought that they let him call his wife. When the defendant got into the police car at the time of the arrest, she noticed a cut on his arm because he only wore a white T shirt (A. 33).

The court denied the defendant's motion to suppress the confessions (A. 34).

EVIDENCE FOR THE STATE ON THE CASE IN CHIEF.

The state presented evidence to the effect that there was a fire at 3356 West Grand Avenue, Chicago in the early morning of April 1, 1962. The fire was of undetermined origin (A. 34-35). Officer Weiss testified that he arrested defendant on May 16, 1962, at about 11:00 P.M. and that defendant made an oral and written statement admitting that he started a fire in the building at the behest of one, Joseph Kanovski, who paid him $100. People's Exhibit 3 was a signed statement taken from the defendant in which defendant gave details of setting a fire by throwing his cigarette on some rags, paper and other debris (A. 35-37).

On cross examination, the following occurred with respect to the taking of the statement by officer Weiss from defendant.

"Q. You told him it would go easier for him in court if he made a statement, didn't you?

A. Well, there wasn't any—

Q. The question is did you tell him it would go easier for him in court if he made a statement?

A. Yes, I did. (A. 39)

Q. Now, during the taking of these statements in question did you tell him he had a constitutional right not to answer questions?

A. No, I didn't.

Q. Did you tell him he didn't have to answer any question if he didn't want to?

A. I did not.

Q. Did you tell him the answers to the questions might be used against him?

A. I didn't." (A. 39-40).

People's Exhibit 3, a confession signed by the defendant, was introduced into evidence and read to the jury over defendant's objections (A. 47). It was a statement taken from the defendant on May 17, 1962 at 1:30 in the morning which stated that he set fire to the building at 3356 West Grand Avenue on April 1, 1962, because Joe Kane asked him if he wanted to make $100 to flip a cigarette onto some oily rags in the rear of the tavern. At first he didn't want to do it. On April 1, he was with Johnny Owens and he decided not to do it but Johnny grabbed him by the arm and told how easy it was to make $100. They had a few drinks; and some time after 3:30 in the morning when he saw all the people leave the tavern he entered the rear door and flipped a cigarette

onto the oily rags and he then departed. A couple of days later Joe Kane gave him $5.00 and he received $5.00 periodically after that (A. 47-48).

People's Exhibit 12, an unsigned statement transcribed by a court reporter taken on May 17, 1962 at 11:20 A.M. in the presence of an assistant State's Attorney, a detective and a secretary was also introduced into evidence over defendant's objections. That statement contained approximately the same matters as contained in People's Exhibit 3 (A. 51-52).

EVIDENCE FOR THE DEFENDANT ON THE CASE IN CHIEF.

The defendant testified he was married, had two children, had gone to one year high school, was employed at the Crescent Cardboard Company for about two years; that on March 31, 1962, he had been in the tavern at 3356 West Grand Avenue, but left there at 2:00 o'clock in the morning on April 1 and had gone home to bed. He had nothing to do with setting a fire. He signed People's Exhibit 3 because his arm was twisted, he was threatened that the officers would make it rough on his wife and that his child will be put into a home and that his wife would be constantly bothered by them; that they threatened to throw him in a cell with a bunch of crazy dope addicts. The statement he signed was not true. He received part of the information that dealt with the fire from statements that Owens and Helmer had made and what the police had told him (A. 55-58). On cross examination he stated that his wife saw him on television on May 17 and made arrangements to get a lawyer (A. 59).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

Where a defendant is not advised that he had a constitutional right not to answer questions, does the holding in Escobedo v. *Illinois require the suppressing of a confession made?*

A. *Should the holdings of California (People* v. *Dorado,* 40 Cal. Rptr. 264, 394 P. 2d 952, Sept. 1964) *and Oregon (State of Oregon* v. *Neely,* 395 P.2d 557, Sept. 1964) *interpreting Escobedo be upheld as against Illinois' contention rejecting the California and Oregon interpretation?*

There is scant disputation about the facts. The arresting officer who was interrogating the defendant in the early morning hours of May 17, 1962, testified he told the defendant, " . . . it would be easier for him in court if he made a statement." (A. 39).

> "Q. Now during the taking of these statements in question did you tell him he had a constitutional right not to answer questions?
> A. No, I didn't.
> Q. Did you tell him he didn't have to answer any questions if he didn't want to.
> A. I did not.
> Q. Did you tell him the answers to the questions might be used against him?
> A. I didn't." (A. 39-40).

Escobedo v. *Illinois* 378 U.S. 478, 84 S.Ct. 1758, 12 L.ed. 2d 977, was decided in June, 1964. Since then, and even now, throughout the land, a variety of judicial interpretations has been placed upon the holding of that case with

results, as is shown here, of a contrary nature. The essence of this court's decision in *Escobedo* is:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' * * *". 378 U.S. at 490, 84 S.Ct. at 1765, 12 L. Ed. 2d at 986.

How then are the courts to interpret this ruling? The Supreme Court of Oregon decided in *State* v. *Neely*, 395 P. 2d 557, at 559:

> "Neely did not request the assistance of counsel; therefore, one of the critical facts present in the *Escobedo* case is absent here. Whether such a request is necessary before an accused can successfully contend he was deprived of his right to counsel we do not now need to decide.
>
> "In the previously-quoted statement of the crucial elements in the *Escobedo* decision, the fact that the defendant had not been informed of his right to remain silent was specifically stated. The majority reiterated that fact in other portions of its opinion . . ."

Oregon, therefore decided, p. 561,

> "We conclude that the *Escobedo* decision requires that an accused be effectively warned of his constitutional right to remain silent and that if this is not affirmatively shown by the state, a confession obtained

without such warning is inadmissible. Whether law enforcement officers must in addition advise an accused of his right to counsel and whether it is necessary that this advice be given by a magistrate we need not now decide."

Neely, relied both on *Escobedo* and the holding of the Supreme Court of California in *People* v. *Dorado*, 40 Cal. Rptr. 264, 394 P.2d 952. *Dorado* held that a confession was inadmissible because the interrogating officer had not advised the accused of his right to remain silent and his right to counsel.

Illinois, on the other hand, rejected this interpretation of *Escobedo*. It also rejected the holding of *Haynes* v. *State of Washington*, 373 U.S. 503, 10 Ill. Ed. 2d 513, and stated:

> "In coming to this conclusion we are mindful of apparently contrary conclusions reached in *State* v. *Neely* (Sup. Ct. Oregon, September 30, 1964) ..... Oregon ....., 395 P.2d 557; and *People* v. *Dorado*, 40 Calif. Rptr. 264, 394 P.2d 952. In the Oregon case the court held a confession inadmissible, concluding that the *Escobedo* decision required that the State must effectively show that the accused was affirmatively warned of his right to remain silent prior to confessing. In the *Dorado* case a divided California court, also relying on *Escobedo*, struck down a confession because the accused had neither affirmatively waived his right to counsel nor had been affirmatively advised of such right. In the *Dorado* case it should also be noted that the accused was interrogated while an inmate of a penitentiary and under prison discipline.
>
> "We do not, however read the *Escobedo* case as requiring the rejection of a voluntary confession because the State did not affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt." (Appendix A, pp. App. 4-5).

But see *Miller* v. *Warden, Maryland Penitentiary,* 338 F. 2d 201, 4 Cir., Oct. 29, 1964 relying on *Escobedo,* which held contrary to Illinois and held invalid a Maryland conviction predicated upon a confession secured while police denied suspect the right to use a phone to call his family or an attorney.

Accordingly, the issue is clear. There are different holdings in the highest courts of at least three states interpreting *Escobedo.* We respectfully submit this is a compelling reason for the grant of this court's writ of certiorari to clarify the Escobedo holding so that there may be no equivocation by the states in interpreting the holding.

II.

The confession was obtained by virtue of the physical abuse. Petitioner's will to resist was overcome.

Defendant had a broken shoulder which was pinned together with wires (A. 3). He also had four stitches on his arm as a result of an accident in his factory (A. 3). Defendant testified that the police wrenched his arm behind his shoulder (A. 3) and further threatened that his shoulder would be of no use to him if he did not confess (A. 5). He said that his arm was hurting him (A. 4).

The officers denied, of course, mistreating him in any way—that they wrenched his shoulder, that they twisted his arm or that they threatened him in any way.

But the evidence is a little confusing—and even conflicting—with respect to the incidents at the time of his arrest. Defendant testified that as he was arrested at 11:00 P.M., his hands were cuffed behind his back (A. 3). Officer Weiss testified defendant was handcuffed with his hands in front of him (A. 16). Officer Wilkins testified that he handcuffed Hartgraves to his partner officer Weiss and that Weiss and

Hartgraves walked to the squad car together (A. 28). State's witness Marjorie Helmer testified that when the police put the defendant in the car they did not handcuff him (A. 33). Officer Wilkins took the defendant by the elbow and they walked to the car. Inside the car the defendant was handcuffed (A. 33).

Many individuals noticed the sore on defendant's arm which was festering. Mrs. Helmer testified that defendant wore only a white T shirt and she could notice the cut on his arm when he got into the police car (A. 33). Defendant testified both his arms were hurting him (A. 5). Officer Weiss testified that during the time that defendant was being questioned and during the taking of the written statement he noticed defendant's left arm bleeding (A. 14). Of course, he did not call the police doctor until the next morning. The pain to the defendant would aid his willingness to give a confession, Officer Weiss did notice that defendant kept rubbing his arm and did notice the wound on defendant's left arm (A. 19). Fire investigator Frank Grady testified he noticed defendant's left arm was cut shortly after defendant arrived at the police station and that there appeared to be a couple of stitches which appeared to be festering. By festering Grady meant "swollen", and meant that there was a little pus or some kind of fluid in the wound (A. 25). Of course, he made no attempt to get a doctor for Hartgraves (A. 25). Detective Wilkins testified the first time he noticed that there was an injury to defendant's left arm was during the time of the oral statement. He believed Officer Weiss called it to their attention. He did not notice the wound at the time of the arrest on the street nor did he recall whether the defendant was in shirt sleeves at the time of his arrest. Nobody attempted to get the defendant a doctor at that time (A. 29-30).

By the time Hartgraves had signed his statement at about 3:30 or 4:00 A.M. in the morning and after he had been taken to the scene of the fire for a re-enactment he was then taken back to the police station. The police officers decided to dress up Hartgraves before they brought him into the office of the assistant State's Attorney for a further statement; and so, the police doctor was called at 10:00 A.M. in the morning for the purpose of dressing the wound. Dr. Rose cleansed the wound and changed the dressing (A. 21).

Mrs. Muriel Hartgraves, wife of the defendant, testified that when she saw her husband on May 18, she noticed that the bone in his right shoulder was sticking up but that before he was arresting the shoulder injury had not been bothering him since the operation (A. 12). Upon being released on bond on May 18, the defendant went to his doctor for medical treatment. Dr. Herbert Shermer testified he was the physician who operated on the defendant two years prior when the defendant had a separation of the collar bone from the acromion, another bone in the shoulder. An operation pinned the two separate bones and the doctors attached wires around them (A. 11).

Dr. Shermer testified that the defendant came to him on May 18th and complained of pain for which the doctor gave the defendant an injection and prescribed sedatives. Dr. Shermer also testified that the type of injury which the defendant had would cause pain if pressure were put upon the shoulder and further, that real severe pressure on the shoulder might cause a separation to occur (A. 11-12).

Under the totality of the circumstances here, where defendant is corroborated in his accusations, is not the confession here extorted by both the physical mistreatment of

the defendant and the threats made against him in connection with his shoulder? The defendant had no reason not to believe that the police had ample power to carry out their threats. *Lynumm* v. *Illinois,* 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed. 2d 922.

The totality of circumstances here evidenced an involuntary written admission of guilt. (*Haynes* v. *State of Washington,* 373 U.S. 503, 10 L.Ed. 2d 513.)

CONCLUSION.

We respectfully submit the petition should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
and
WARREN WOLFSON
Attorneys for Petitioner

APPENDIX A

(Opinion modified upon denial of petition for rehearing November 23, 1964.)

Docket No. 38098—Agenda 6—May, 1964.

The People of the State of Illinois, Defendant in Error, v. Robert Hartgraves, Plaintiff in Error.

Mr. JUSTICE SOLFISBURG delivered the opinion of the court:

Defendant Robert Hargraves was tried in the criminal court of Cook County before a jury, found guilty of arson, and sentenced to the penitentiary for a term of not less than four nor more than eight years. He prosecutes this writ of error to review his conviction. The defendant contends that he was wrongfully denied the right to inspect upon demand the police report of a prosecution witness, and that a confession was obtained by constitutionally impermissible means.

A verified petition of the defendant to suppress a confession was filed in advance of the trial and a hearing was held thereon. Officer John Weiss, one of the witnesses who testified for the State in opposition to the motion to suppress, admitted on cross-examination that he had read over a statement or report before testifying to refresh his memory. At this point the attorney for the defendant made a demand to inspect the report. The State did not immediately produce the report, but the following day presented to the court the field report referred to by officer Weiss. The trial court examined the report and denied the defendant the right to inspect the report under the authority of *People* v.

Moses, 11 Ill.2d 84 and *People* v. *Wolff*, 19 Ill.2d 318. The defendant, relying on the same cases, contends that the trial judge erred in denying the defense the right to inspect the police report.

In the case of *People* v. *Wolff*, 19 Ill.2d 318, this court held that where no privilege exists and where the relevance and competency of a statement or report have been established, the trial judge shall order the document delivered directly to the accused for his inspection and use for impeachment purposes. However if the prosecution claims that any document ordered to be produced is not relevant to the testimony sought to be impeached the trial judge will inspect the document and may, at his discretion, delete unrelated matters before delivery is made to the accused. This presupposes that if the document does not relate to the testimony given by the witness, the entire document may be excluded. It is quite apparent that the trial court followed exactly the procedure set forth in the case of *People* v. *Wolff*, and more fully explained in *People* v. *Wright*, 30 Ill.2d 519.

Despite our belief that the trial court correctly followed the proper procedure with regard to an impeaching document, we feel that the defendant was entitled to inspect the report for another reason. It is clear that a defendant has the right to examine any document used by a witness on the stand to refresh his present recollection. This right was extended by this court in *People* v. *Scott*, 29 Ill.2d 97, where we held that a defendant had the right to inspect any refreshing material referred to by a witness before trial outside the courtroom. Since officer Weiss testified that he had refreshed his recollection by reference to this report, the defendant was entitled to examine the document on that ground. The record does not make it clear whether

defendant's demand for production of the document was grounded on the right to inspect an impeaching document or a refreshing document. In this appeal defendant relies solely on the doctrine of the *Moses* and *Wolff* cases which, as we have noted, was followed. Defendant did not seek to incorporate the document into the record on appeal. The State, however, has attached a copy of the document to its brief without objection and we find nothing impeaching therein, and nothing to detract from the testimony of the witness. The document was requested in connection with the cross-examination of a witness on the motion to suppress which was a matter heard by the court and the court had examined the document. Under all the facts and circumstances we do not believe that the refusal to permit defendant to examine the document requires a reversal.

Finally, the defendant contends that the confessions should have been suppressed, alleging on appeal that they were obtained by physical and mental abuse and coercion, a promise of leniency, and because the defendant was refused the right to make a telephone call during interrogation and was not advised of his constitutional right to remain silent. The trial court determined these questions by a preliminary hearing and held that the confessions were voluntary. On review such determination will not be disturbed unless manifestly against the weight of the evidence, or unless the court has committed an abuse of discretion. *People* v. *DiGerlando*, 30 Ill.2d 544; *People* v. *Spencer*, 27 Ill.2d 320.

Defendant's verified petition to suppress his confession alleged that he was held incommunicado for three and one-half hours without being allowed to contact friends or family and without sleep, food or water, and that he was continuously struck, beaten and threatened by the police. On the hearing on the petition the court heard the testimony

of fourteen witnesses, which testimony covers over 330 pages of the record. The defendant testified that the police were guilty of repeated brutality and that he was refused permission to telephone his wife or make any other phone call; that he was threatened; and that the police threatened harm to his wife and child. It is for these reasons that defendant claims to have confessed falsely.

Overwhelming testimony by the police officers, police doctors, an assistant State's Attorney and other witnesses clearly and convincingly refute the claim of brutality or other mistreatment, and of threats to himself, his wife or child. It is clear that the shoulder injury suffered by defendant was caused by two prior injuries in no way connected with his arrest or treatment by the police.

The testimony further refutes the claim that defendant was denied the right to make a phone call and the trial judge could clearly have found from the testimony of at least two witnesses that defendant was permitted to make a phone call to his wife upon his first request and that he called and talked to her and advised her not to worry.

It is true that defendant was not affirmatively warned that his confession might be used against him, but it has been held that this does not render a confession incompetent. (*People* v. *Davis*, 10 Ill.2d 430; *People* v. *Fox*, 319 Ill. 606.) We have re-examined these holdings in the light of *Haynes* v. *State of Washington*, 373 U.S. 503, 10 L. ed. 2d 513, relied upon by defendant, and the more recent decision in *Escobedo* v. *Illinois*, —— U.S. ——, Doc. 615 filed June 22, 1964. (12 L. ed. 2d 977.) As we read the *Haynes* case, the United States Supreme Court merely stated that the failure to warn a defendant and advise him of his right to remain silent, is an attendant circumstance "which the accused is entitled to have appropriately con-

sidered in determining voluntariness and admissibility of his confession." 373 U.S. at 517.

In the *Escobedo* case, the United States Supreme Court held that the refusal of a request to consult with counsel, coupled with a failure to warn accused of his right to remain silent, amounted to a denial of "the Assistance of Counsel" as guaranteed by the Sixth Amendment to the United States Constitution.

In the present case the trial court considered testimony of the failure to warn the accused, and there is no evidence that defendant requested the assistance of counsel. Under all the facts and circumstances of this case, we hold that the failure to warn the accused did not compel a rejection of the confession.

In coming to this conclusion we are mindful of apparently contrary conclusions reached in *State* v. *Neely*, (Sup. Ct., Ore., September 30, 1964), —— Ore. ——, 395 P.2d 557; and *People* v. *Dorado*, 40 Calif. Reptr. 264, 394 P.2d 952. In the Oregon case the court held a confession inadmissible, concluding that the *Escobedo* decision required that the State must effectively show that the accused was affirmatively warned of his right to remain silent prior to confessing. In the *Dorado* case a divided California court, also relying on *Escobedo*, struck down a confession because the accused had neither affirmatively waived his right to counsel nor had been affirmatively advised of such right. In the *Dorado* case it should also be noted that the accused was interrogated while an inmate of the penitentiary and under prison discipline.

We do not, however, read the *Escobedo* case as requiring the rejection of a voluntary confession because the State did not affirmatively caution the accused of his right

to have an attorney and his right to remain silent before his admissions of guilt.

The defendant was arrested and transported to police headquarters at approximately 11:00 P.M. on the night of May 16, 1962. He signed his first confession at 1:30 A.M. the following morning and a second narrative confession was transcribed at 11:20 that morning. Prior to his confessions he was confronted with the transcribed accusations of two other persons involved in the crime after which he confessed and posed for a photographic re-enactment of the crime. On the evidence on the motion to suppress we think the trial court properly found that the confessions of the defendant were voluntary.

On this appeal, however, defendant strenuously argues that the voluntariness of his confession was vitiated by a promise of lenience or immunity, citing *People* v. *Martorano*, 359 Ill. 258. It must be noted that neither the petition to suppress nor defendant's testimony at the hearing on the petition raised any suggestion that his confessions were induced by a promise of leniency. This question arose only after an extensive cross-examination of one of the police officers, in which he admitted that he told the defendant, "It would go easier for him in court if he made a statement." This is in no way the direct promise of leniency made in *People* v. *Heide*, 302 Ill. 624. Such a mere suggestion of the advisability of making a statement does not of itself render a confession involuntary. *People* v. *Pugh*, 409 Ill. 584, 593; *People* v. *Weber*, 401 Ill. 584, 598.

It is further significant that the defendant did not suggest that he was influenced by any promise of leniency until the statement of the police officer on cross-examination. A reading of the entire record indicates by over-

whelming weight of the evidence that defendant voluntarily confessed after being confronted with accusatory statements of two other persons involved in the crime.

The trial court properly held that the confessions given by the defendant were voluntary and the evidence presented at the trial in this case clearly established defendant's guilt beyond a reasonable doubt. The judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 894

ROBERT HARTGRAVES,
Petitioner.

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

DANIEL P. WARD,
State's Attorney of Cook County.
Criminal Court Building,
2600 South California Avenue,
Chicago, Illinois 60608,
Attorney for Respondent.

ELMER C. KISSANE,
WILLIAM J. NELLIS,
Assistant State's Attorneys,
Of Counsel.

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IN THE

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

An accurate and satisfactory reference is contained on page 2 of the Petition herein. The same opinion is also reported at 202 N. E. 2d 33.

JURISDICTION.

An accurate and satisfactory reference is contained on page 2 of the Petition herein.

CONSTITUTIONAL PROVISIONS INVOLVED.

An accurate and satisfactory reference is contained on page 2 of the Petition herein. The pertinent text of the three provisions, excluded from the Petition, has been printed in this Brief and designated as "APPENDIX A".

QUESTIONS PRESENTED FOR REVIEW.

I. Whether a substantial and undecided federal question of the denial of assistance of counsel is presented by voluntary, self-incriminatory statements of a normally intelligent adult, commencing about two hours after arrest and accompanied by a reference to but no request for counsel.

II. Whether fact determinations that the aforesaid statements were not the product of actual or threatened physical coercion, or of a denial of requested telephone communications, or of a promise of leniency, require an independent examination.

PRELIMINARY STATEMENT.

References herein to "R." signify the certified record and transcript of proceedings in the trial court. References herein to "Abst." signify the certified Abstract of Record originally filed in the Supreme Court of Illinois, and appear when the relevant record fact has been abstracted.

STATEMENT OF THE CASE.

Omissions and distortions in the statement of the case recited at pages 4 through 16 of the Petition herein compel an entire restatement of the investigatory progress preceding, and the relevant circumstances of, the allegedly irresponsible crime detection of May 16 and 17, 1962.

On May 29, 1962 the presiding grand jurors of Cook County voted to indict both Clarence Joseph Kanovski and Robert Hartgraves for an arson of April 1, 1962 allegedly designed to defraud three insurers—the monetary, pre-trial bail of Hartgraves was 10% of that of Kanovski, who later received a severance for trial (Abst. 1; R. 3A-7A, 3). That indictment and the ultimate conviction of Hartgraves

were in part the product of his self-incriminatory statements on May 17, 1962.

Marjorie Helmer, a prosecution witness, had abandoned her husband and ten children to cohabit with Johnny Owens[1] in the second-floor apartment above a tavern in the relevant building before and until the 5:00 a.m. fire on April 1, 1962 (R. 324-325, 333-334). Warned by Owens of the imminent fire, Helmer at his request secured a $2000 insurance policy on her belongings (Abst. 50-51; R. 529-530). Around 3:00 a.m. on April 1 Hartgraves informed Helmer "... that if the building wasn't emptied out when he got there it was going to be cancelled to another date" (Abst. 50; R. 525). Two weeks later Hartgraves discussed the fire and informed Helmer that "... Joe was supposed to take care of it for him. . . . he was getting a loan and Joe was going to take over the payments and book" (Abst. 50; R. 526, 539). On May 4, both "scared" and subsidized by Kanovski, Helmer boarded a bus for Memphis and its Peabody Hotel, where she was joined on May 5 by Owens (Abst. 51; R. 531, 537, 540-541). Financially destitute a few days later, Helmer telephoned her mother in Chicago and "told her you were broke, wanted to come back?" (Abst. 51; R. 531). When the Memphis bus arrived at the Chicago terminal on May 8, Helmer was greeted by her mother, her husband, police officers John Weiss and George Wilkens (of the Chicago Police Department), and arson investigator Karl Scheel (of the Chicago Fire Department), to whom she

1. Johnny Owens was a fugitive witness during the hearing and trial, postponed until May of 1963. Helmer searched and found him in Memphis, Tennessee in January, 1963 but, instead of responding to the Chicago Police Department that Owens would not voluntarily return, joined him on a two-week vacation in Pensacola, Florida before bidding a permanent farewell on January 26. Subsequent moves to locate the probation violator did not succeed (Abst. 33, 41, 51; R. 321-322, 338-342, 436, 523, 545-547).

supplied her statement (R. 407-408, 477-478, 515, 543). Weiss had first spoken to Helmer's mother on April 26, 1962 (R. 385, 406). Helmer, ignorant of Owens' address in Memphis, later telephoned Owens to request his return, since "[t]hey would try to work something out" (R. 532, 542). Alone, Owens arrived in Chicago on May 16 and met Helmer around 3:00 p.m. at the police headquarters building, where he furnished his statement to Weiss, Wilkens and Scheel (Abst. 35; R. 322-323, 408-409, 478, 515).

A warrant for the arrest of Hartgraves was secured around 8:00 p.m. on May 16 (R. 158), and Helmer, Owens, Weiss, Wilkens and Scheel later proceeded in a four-door, Ford automobile to a tavern at the corner of St. Louis and Armitage Avenues. There, around 11:00 p.m., in order to avoid the risk "... that some member of his [Hartgraves'] family would have time to notify Mr. Joseph Kanovski that we were investigating the arson of 3356 West Grand Avenue" (Abst. 28; R. 248), Helmer obediently telephoned the Hartgraves residence less than a block away and, through a pre-arranged signal with Hartgraves himself, told his wife that she was Mrs. Kanovski and that her husband's automobile was near the specific tavern in need of repair by Hartgraves. Helmer then spoke to Hartgraves, and his arrest in front of the tavern immediately followed (Abst. 12, 26-27, 36, 46, 55-56; R. 101, 158-159, 164-165, 232, 246, 284-285, 315-316, 386, 468-469, 603-604, 674-675, 744-745).

Wilkens walked to the automobile parked by Hartgraves, identified himself as a police officer, and spoke of and exhibited the arrest warrant (R. 248, 250-251)—incidents which the petitioner conceded, but chronicled at shortly after 10:00 p.m. (Abst. 55-56; R. 10-11, 603-604). The material incidents intervening between the arrest and the initial admission of complicity by Hartgraves, relative

to actual and threatened *physical coercion*, are in dispute and require an inspection of testimony.[2]

HARTGRAVES. Wilkens threatened to strike him if he didn't exit his vehicle and, when he did, Scheel twisted his right arm and—*informed* about the prior injury—"... told me not to worry about my right arm, they would take care of that" (Abst. 3, 56; R. 10, 604). Weiss handcuffed him behind his back and Scheel (who was 6' 3" and 240 pounds: Abst. 31; R. 295) "... grabbed my pants, practically lifted me off the floor and shoved me into the squad car" (Abst. 3, 56, 58; R. 10-11, 604, 625-626). Because at the arrest scene the officers had "... bumped up against this scar, this cut I had on my left arm" (Abst. 4; R. 15), it began bleeding in the squad car, as Hartgraves told the police doctor later in the morning (Abst. 7; R. 33, 622); confronted at the *hearing* with a photographic demonstration that there was neither fresh nor dried blood on the wound earlier in the morning (Abst. 9; R. 64-67), Hartgraves testified at the *trial* that the "little trickle" had occurred "... when they pushed me into the squad car [because] my arm bumped up against the side of the car getting in" and was not disclosed at that time (R. 623-624). At police headquarters Wilkens "... said that if I didn't confess, they were going to throw me in a cell with a bunch of crazy dope addicts" (Abst. 4-5, 56; R. 15-16, 607) and Weiss "... told me that he could see that my wife and kid was taken care of, that my kid would go to a home, and my wife, he'd make it so miserable for her she couldn't find a job anywhere to support the kid" (Abst. 5, 56; R. 17, 606). Thirty minutes

2. It is not disputed that in 1959 two bones in Hartgraves' right shoulder had been separated and then joined by wires (Abst. 11; R. 145) and that around May 14, 1962, after an occupational injury that also was *not* "bothering [him] at the time of arrest" (Abst 3; R. 9) and had "healed" (R. 621-622), four stitches had been sewn by a company doctor over a cut in his left arm (Abst. 7; R. 30-31).

after arrival at headquarters, he read the statements of Owens and Helmer ". . . saying that I had started the fire and where I had started it and how much I had received for it" (Abst. 6-8, 59; R. 21, 39, 68-69, 637).

WEISS. The claims of mistreatment and threats were false (Abst. 12, 14-16, 63; R. 105, 113-115, 122-123, 126, 724-725) and, as Hartgraves voiced no complaints, the courtroom revelation of a prior shoulder injury was a complete surprise (Abst. 38, 41; R. 180, 417, 437-438). Hartgraves was *not* handcuffed (Abst. 12; R. 104); he *was* handcuffed in front between the arrest scene and the Ford, where one cuff was switched from the left hand of Hartgraves to that of Weiss, who rode in the rear with Hartgraves, Helmer and Owens (Abst. 17; R. 160, 412, 417). During the interrogation between midnight and 1:15 a.m. Hartgraves rubbed his left arm, expressed the time of the injury as two weeks earlier and denied that it was hurting (Abst. 14, 41; R. 115, 434). It was not bleeding but ". . . looked like it was festering or something around the stitch ends" and at 9:30 a.m. a police doctor (Louis Rose, M.D.) was asked to examine the wound (Abst. 14, 19, 40-41; R. 116, 181, 425, 434). Confronted with the statements of Helmer and Owens, Hartgraves first called them liars, then (in the presence of Weiss *alone*) said Owens was present when he started the fire, and finally (when Owens entered the room) admitted that the Owens reference was a lie (Abst. 13, 18, 36-37; R. 108-109, 171-173, 389-394).

WILKENS. The claims of mistreatment and threats were false (Abst. 26-27, 63; R. 233-235, 238, 244-245, 728-731) and, as Hartgraves voiced no complaints, the courtroom revelation of a prior shoulder injury was a complete surprise (Abst. 47; R. 265, 475-476). Wilkens handcuffed the right hand of Hartgraves and handed the other cuff to Weiss, to whom Hartgraves was cuffed and who rode in

the rear with Hartgraves, Helmer and Owens (Abst. 28; R. 249-252, 481-483). During the interrogation between midnight and 1:30 a.m. Weiss noticed the arm wound and informed the others, but Hartgraves ". . . said he got it at work, it was nothing, and it had been treated" (Abst. 29-30, 47; R. 259-261, 485). It was not bleeding but "looked infected" and at 10:00 a.m. was examined by a police doctor (Louis Rose, M.D.) (Abst. 26-27; R. 235, 238, 242, 260). Hartgraves was confronted with the statements of Helmer and Owens, and Weiss then asked the others to leave the room and alone heard the initial admission (Abst. 27-29, 46-47; R. 237, 256, 470, 486).

SCHEEL. The claims of mistreatment and threats were false (Abst. 31, 63; R. 276, 280, 719-721) and, as Hartgraves voiced no complaints, the courtroom revelation of a prior shoulder injury was a complete surprise (R. 281, 294). The right hand of Hartgraves was handcuffed, and Wilkens held the handcuffs (R. 514-515). Scheel noticed the left arm wound after the arrival at police headquarters, but did not notice blood or "anything unusual about the wound" (Abst. 31; R. 293, 508). Scheel witnessed the medical examination later in the morning (Abst. 49; R. 280-281, 508).

HELMER. The claims of mistreatment and threats were false (Abst. 32, 50, 63; R. 317-321, 527, 741-744) and, as Hartgraves voiced no complaints, the courtroom revelation of a prior shoulder injury was a complete surprise (R. 335). After the arrest by Wilkens, either Weiss or Wilkens escorted Hartgraves to the squad car and, an arm on his elbow, assisted his entrance; at an unknown moment before arrival at the police station, Hartgraves was handcuffed (Abst. 32-33; R. 316, 330, 538-539). Helmer first noticed the left arm wound in the vehicle; it was not bleeding but had healed (Abst. 33; R. 320, 335, 527).

FRANK GRADY. According to this fire insurance agent, whose part began in the arson office at police headquarters when Hartgraves and his captors arrived (Abst. 23, 25; R. 205, 220), the claims of mistreatment and threats were false (Abst. 23-24, 63; R. 207-208, 733-734) and, as Hartgraves voiced no complaints, the courtroom revelation of a prior shoulder injury was a complete surprise (Abst. 25, 53; R. 215, 224, 572). Grady noticed the left arm wound shortly after Hartgraves' arrival at the arson office; neither blood nor other fluid was rising from the wound but, beneath the stitches, a swelling was apparent (Abst. 24-25, 53-54; R. 214-215, 223, 572-575). The police doctor's examination took place later in the morning (Abst. 54; R. 575). Hartgraves was confronted with the statements of Helmer and Owens and then admitted his complicity (Abst. 23; R. 207-208, 576).

DR. LOUIS ROSE. The police doctor examined Hartgraves about 10:00 a.m. in the arson office, and cleansed and dressed the healing wound which was not bleeding and which Hartgraves described as an occupational injury of May 11, which had been treated at a private clinic. There was no complaint about the right shoulder or police coercive practices (Abst. 21-22, 62; R. 149-154, 709).[3]

HERBERT SHERMER. This defense witness, a private physician who examined Hartgraves on May 18, 1962, furnished the key to the validity of the brutality claim. There were

3. Other witnesses to the several issues of coercion were police clerk Isabel Byrne (Abst. 30, 52, 62; R. 267-274, 558-564, 712-718), who recalled that ". . . Wilkens told him that they had called the doctor to look at the arm because they thought it may need attention and he declined attention but they insisted on the doctor seeing it anyhow" (R. 714); John Thornton, the municipal fire attorney (Abst. 22-23, 63; R. 200-205, 735-740); Jerome Miller, a stenographer (Abst. 31; R. 299-305); and Daniel McCarthy, a prosecutor (Abst. 32, 62; R. 305-314, 697-707).

no discernible symptoms of injury except the hearsay of the patient: he ". . . complained that he was extremely ticed the bone was sticking up again . . . . [o]n his right shoulder" (Abst. 11; R. 146). His expert testimony was thus in direct conflict with the views of Muriel Hartgraves, the petitioner's wife and a nurse, who on May 18 ". . . noticed the bone was sticking up again . . . [o]n his right shoulder, just above where the incision was made" (Abst. 10; R. 87).

About fifteen minutes after the private oral admission to Weiss alone (Abst. 36; R. 393-394), Hartgraves at 1:30 a.m. began to answer questions of Weiss in the presence of Wilkens, who accurately and simultaneously recorded the conversation by typewriter (Abst. 13-14, 27; R. 106-107, 113, 235-236, 264-265). The product, which was signed by Hartgraves and others around 3:30 a.m. (Abst. 14, 37; R. 118, 395-397), was introduced into evidence at the trial despite objection (Abst. 47; R. 490) and was read to the jury (Abst. 47-48; R. 490-497).

A warrant for the arrest of Clarence Joseph Kanovski had previously been secured (R. 119) and shortly after 4:00 p.m. Weiss, Wilkens, Scheel, Grady, Helmer, Owens and Hartgraves traveled in two vehicles to a gas station at Fullerton and Sawyer Avenues. Hartgraves had advised the police ". . . that Kanovski would not come out of his home for anybody, and he told us that he'd make a call" (R. 120). In response to that telephone call, Kanovski arrived at the gas station and was arrested (Abst. 15, 20, 27, 53; R. 119-122, 187-188, 239, 277, 318, 568). Wilkens then drove his two passengers, Grady and Hartgraves, to the latter's home at his request for a clean shirt and the opportunity to ask his wife to notify his employer about his expected absence. Grady entered the living room and listened as Hartgraves instructed his wife, in the adjoining bedroom, to notify the employer (Abst. 24-27, 53-

54; R. 210, 224-226, 240, 568-569, 577-578).[4] The group in each vehicle next traveled to the fire scene where, in the presence of other officials of the Chicago Fire Department, Hartgraves described the *modus operandi* of the arson (Abst. 15, 24, 27; R. 121-123, 212, 240-241, 278).

After the 10:00 a.m. treatment by Louis Rose, M. D. (Abst. 21; R. 149), Hartgraves at 11:20 a.m. began to answer questions of Daniel McCarthy, an Assistant State's Attorney of Cook County, in the presence of stenographer Jerome Miller, who accurately and simultaneously recorded the conversation by means of a stenotype machine (Abst. 31, 51; R. 300. 306-307, 550). The product, which Hartgraves refused to sign the following day (May 18) (Abst. 32; R. 309-310), was introduced into evidence at the trial despite objection (Abst. 52; R. 550-551) and was read to the jury (Abst. 52; R. 551-558).

On the morning of May 18 Hargraves appeared in court for a preliminary hearing and was released on bail (Abst. 7, 60; R. 25, 193, 677). A year and four days later, Hartgraves for the first time complained of his treatment in police custody between 10:00 a.m. of May 16 and 1:30 a.m. on May 17, alleging under oath that he ". . . was not allowed to contact friends or members of his family, despite . . . repeated requests . . . . [and that he] was without sleep, food, or water, and he was continuously struck, beaten and threatened . . ." by his captors (Abst. 1-2; R. 9A-10A).

4. Hartgraves testified at the hearing that he did not converse with his wife, and at the trial that he asked her to communicate with his employer (Abst. 8, 57; R. 56, 610).

REASONS FOR DENIAL OF PETITION FOR WRIT OF CERTIORARI.

I.

Whether a Substantial and Undecided Federal Question of the Denial of Assistance of Counsel Is Presented by Voluntary, Self-Incriminatory Statements of a Normally Intelligent Adult, Commencing About Two Hours After Arrest and Accompanied by a Reference to But No Request for Counsel.

At the preliminary hearing to determine the voluntariness of his confessions, the extensive testimony of Robert Hartgraves was silent about his assistance of counsel on May 16 and 17, 1962 (Abst. 3-11; R. 8-85, 98-100). Police officer John Weiss then testified at the hearing that, in the course of the initial admission of guilt to Weiss alone around 1:15 a.m. on May 17 (Abst. 36; R. 393-394), Hartgraves "... asked, '*Do I need a lawyer?*' And [Weiss] said, '*Yes, you do*' (Abst. 20; R. 194) (Also see: Abst. 16; R. 126). According to Weiss, a request for a delay or for counsel or, until later (see Point II, *infra*), for the use of the telephone was not voiced (Abst. 17, 20; R. 170, 195).[5] Nor was Hartgraves the recipient of any further admonition. Since the principal suspect was Clarence Joseph Kanovski, and since the preceding and unconfirmed data had been furnished by two fugitives of doubtful credit (Marjorie Helmer and Johnny Owens), a realistic inference is that the questions of Weiss were primarily investigatory and not accusatory and that *his* purpose was not a confession

5. Hartgraves postponed any comment upon this exchange until trial, when he admitted the substance of the remarks and added that ". . . I asked him if I could make a phone call to call one and I didn't get no answer to either question" (Abst. 58; R. 615). After his wife's retention of an attorney, Hartgraves was released on bail on May 18 (Abst. 7, 59, 61; R. 25, 630-631, 683-684).

but a statement for prospective impeachment at a trial of Kanovski.

The present reliance upon conclusions that *Escobedo* v. *Illinois*, 378 U. S. 478, requires an affirmative instruction at least about the constitutional right of silence, *State* v. *Neely*, 395 P. 2d 557 (Ore.), and perhaps also about the right to counsel, *People* v. *Dorado*, 40 Cal. Rptr. 264, 394 P. 2d 952, is therefore misplaced. (Modified and unreported opinions after rehearings in *Dorado* and *Neely* were announced on January 29 and 27, 1965, respectively. Both California and Oregon, by 4-3 and 6-1 divisions, now demand evidence of warnings about silence *and* counsel.) An adult of normal intelligence, Hartgraves deliberately chose not to interrupt the interrogation by a demand to exercise his rights.[6] The Supreme Court of Illinois was justified in its essential conclusions that:

> ". . . there is no evidence that defendant requested the assistance of counsel. Under all the facts and circumstances of this case, we hold that the failure to warn the accused did not compel a rejection of the confession." *People* v. *Hartgraves*, 31 Ill. 2d 375, 380, 202 N. E. 2d 33, 35; see Petition, App. 5.

The author of that opinion, Mr. Justice Solfisburg, proceeded to dispute the validity of both *Neely* and *Dorado* and discovered no mandate in *Escobedo* that law enforcement personnel in every instance *must* ". . . affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt" (at 36). Although the record does not present this precise question, the sound reply is dictated and supported by ample reason and experience. And the view that a request

6. At this interrogation, as now, interference by peace officers with the right of a person in custody to communicate or consult with family or counsel was a criminal offense. Ill. Rev. Stat. 1963, ch. 38, par. 736b, 736c; also see par. 103-3, 103-4 and 103-8.

for counsel is a critical circumstance has been expressed, in a great variety of postures, by a large number of tribunals. E.g., *Browne* v. *State*, 131 N. W. 2d 169 (Wis.); *Commonwealth* v. *Patrick*, 206 A. 2d 295 (Pa.); *Green* v. *State*, 203 A. 2d 870 (Md.); *Hayden* v. *State*, 201 N. E. 2d 329 (Ind.); *Jackson* v. *United States*, 337 F. 2d 136 (D. C. C. A.); *Mitchell* v. *Stephens*, 232 F. Supp. 497 (E. D. Ark.); *Morford* v. *State*, 395 P. 2d 861 (Nev.); *Pece* v. *Cox*, 396 P. 2d 422 (N. Mex.); *People* v. *Agar*, 253 N. Y. S. 2d 761 (Sup. Ct. Queens Co., N. Y.); *Ralph* v. *Pepersack*, 335 F. 2d 128 (C. A. 4); *State* v. *Fox*, 131 N. W. 2d 684 (Iowa); *State* v. *Howard*, 383 S. W. 2d 701 (Mo.); *State* v. *McLeod*, 1 Ohio St. 2d 60; 203 N. E. 2d 349 (Ohio); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669; *State* v. *Stinson*, 139 S. E. 2d 558 (N. C.); *State* v. *Wessett*, 205 A. 2d 510 (Sup. Ct. New Castle, Del.); *Turner* v. *State*, 384 S. W. 2d 879 (Tex.); *United States ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837 (C. A. 7).

The crucial incident here is the reasonable conclusion of the courts of the State of Illinois that Hartgraves, an intelligent adult, retained control of the interrogation and was not ignorant of his right to counsel. This unanimous and justified result captures the middle path in the divided ruling of *Jackson* v. *United States*, 337 F. 2d 136 (D. C. C. A.), *supra*, wherein advice of the rights of silence and counsel had been communicated to the accused on the preceding day (at 138). The dissenter, Mr. Justice Fahy, could discover no waiver of counsel in the advice and absence of a request, but evidently would outlaw all secret interrogation beyond the presence of counsel (at 143-145). Concurring briefly, Mr. Justice Burger found no authority for rejecting ". . . all [voluntary] statements made by an uncounselled person in custody" (at 141), and evidently

would not require any affirmative caution. The *Jackson* opinion itself, delivered by Mr. Justice Danaher, essentially provided (at 140-141):

> "Obviously neither *Escobedo* nor *Massiah* can be read as barring use of this appellant's confession. Many, learned in the law, deeply believe that no accused should be convicted out of his own mouth. But the Supreme Court has never announced any such proposition—not even where the accused had no attorney and had received no Rule 5 "judicial caution." *United States* v. *Mitchell*, 322 U. S. 65, 70, 64 S. Ct. 896, 88 L. Ed. 1140 (1944). . . . If there were a rule that a confession may not be received *if made by an accused without counsel*, that would be the end of this case—and of scores like it.
>
> "We conclude that no rule of law required the exclusion of this appellant's confession, voluntarily made, after he had been warned by the F. B. I., the police and the United States Commissioner acting pursuant to Rule 40(b). He had not requested that counsel be appointed; he had retained no lawyer; that one was not then appointed for him denied him no right; and as the law now stands, there is no automatic rule of exclusion which will bar use of such a confession by an accused who has no lawyer, under circumstances such as appear on the record before us."

The actual interrogators in *Jackson* merely ". . . advised him that he did not have to speak to them" (at 138); the unproductive reference to *counsel* by Weiss was a no less satisfactory caution. The reasonable position of Mr. Justice Danaher, tempered with the recognition that fair criminal interrogation and voluntary disclosures are essential tools in the promotion and protection of a free society, deserves adherence and contradicts any claim that the questions answered by Robert Hartgraves present an undecided federal question of substance.

II.

Whether Fact Determinations That the Aforesaid Statements Were Not the Product of Actual or Threatened Physical Coercion, or of a Denial of Requested Telephone Communications, or of a Promise of Leniency, Require an Independent Examination.

Robert Hartgraves, by his two written admissions and by his testimony at the hearing and trial, described himself inescapably as a mature adult of at least average intelligence, who was not unaware of his rights on arrest. He was neither mentally subnormal nor youthful nor naive and impressionable. Nor was he the victim of extended or repeated interrogation, or deprivation of sleep or food, or the use of psychiatric techniques.[7] Nevertheless, he presents a series of circumstances to support a claim of coercion.

Communication. By testimony and argument the petitioner has attempted to establish that ". . . [c]onfronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family [he] understandably chose to make and

7. The petitioner's response to the claim of physical abuse is contained in the preceding "statement of the case." Relative to nourishment, Hartgraves at the hearing testified that between his arrest and completion of the second confession he had received neither food nor coffee and his requests for water had been scorned; at the trial he recalled a cup of coffee at the fire scene (Abst. 5, 7, 57; R. 18, 35, 49-50, 612). Contrarily, the prosecution witnesses testified that around 1:30 a.m. and again around 3:30 a.m. Hartgraves declined offers of food and drank coffee; and that around 6:00 a.m. at the fire scene he shared coffee and rolls before declining another offer of food at 8:30 a.m. (Abst. 14-15, 24, 30, 37; R. 117-118, 125, 211, 241, 265-266, 320, 397, 404, 571). The earlier written statement of Hartgraves, by establishing that he drank coffee and declined food around 1:30 a.m., contradicts his testimony (R. 496).

sign the damning written statement. . . ." *Haynes* v. *State of Washington*, 373 U. S. 503, 514. The Supreme Court of Illinois reacted with disbelief:

> "The testimony further refutes the claim that defendant was denied the right to make a phone call and the trial judge could clearly have found from the testimony of at least two witnesses that defendant was permitted to make a phone call to his wife upon his first request and that he called and talked to her and advised her not to worry." *People* v. *Hartgraves*, 31 Ill. 2d 375, 379, 202 N. E. 2d 33, 35; see Petition App. 4.

Hartgraves testified at the hearing that he had requested to use the telephone to call "my wife" (Abst. 5; R. 18) or "somebody to get a representative" (Abst. 6; R. 23), but that police officer John Weiss forbade telephone calls until he had been booked (Abst. 4-6; R. 14, 18-19, 23); at the trial Hartgraves described the intended receiver of the telephone call as an attorney (Abst. 58; R. 615). Weiss testified that, after the initial admission of guilt to Weiss alone around 1:15 a.m. (Abst. 36; R. 393-394), Hartgraves explained that his wife was pregnant[8] and upon his only request telephoned her (Abst. 13-14, 20-21; R. 106, 118-119, 195-196). The only other established witness to the telephone call, Marjorie Helmer, while seated outside the room containing Weiss and Hartgraves, overheard the request ". . . to call his wife because she was pregnant and he didn't want her to worry herself" (Abst. 33; R. 331); he then placed the call and ". . . told her that he was being questioned in regards to the fire and not to worry" (R. 337).

Promise. The question whether his captors had suggested or proposed leniency was absent from the particular-

8. Muriel Hartgraves testified that the second Hartgraves child was born in August, 1962, three months after the confessions in issue (R. 680).

ized and verified Petition to Suppress and from the extensive testimony of Hartgraves at the preliminary hearing (Abst. 1-11; R. 9A-10A, 8-85, 98-100). At the trial Hartgraves testified that ". . . Weiss told me if I went ahead with this statement that I would get probation, I could walk out of this courtroom a free man and wouldn't have to worry about anything" (Abst. 58; R. 615). At both the hearing and the trial Hartgraves explicitly traced his confessions to the alleged physical abuse and threats (Abst. 9-10, 57; R. 84, 607). The Supreme Court of Illinois concluded that the remarks of Weiss were a permissible and inconsequential opinion and exhortation toward truth:

> ". . . This question arose only after an extensive cross-examination of one of the police officers, in which he admitted that he told the defendant, 'It would go easier for him in court if he made a statement.' This is in no way the direct promise of leniency made in *People* v. *Heide*, 302 Ill. 624. Such a mere suggestion of the advisability of making a statement does not in itself render a confession involuntary. . . .
>
> "It is further significant that the defendant did not suggest that he was influenced by any promise of leniency until the statement of the police officer on cross-examination. . . ." *People* v. *Hartgraves*, 31 Ill. 2d 375, 381, 202 N. E. 2d 33, 36; see Petition, App. 6.

The only reliable measure of the present claim of an unfair inducement consists of the testimony of Weiss, as the testimony of Wilkens (Abst. 30; R. 261-262) and the absence of relevant testimony by other witnesses effectively narrowed the incident to a private conversation between Weiss and Hartgraves. Weiss testified essentially that he had not expressed "any promises or any inducement" (R. 437) but only an opinion of the possible consequences of an admission of guilt. At the hearing Weiss described that opinion (Abst. 18-19; R. 173-175):

"Q. Did you give him any reasons why he should make a statement?

A. No.

Q. Did you tell him it might be better for his soul if he made a statement?

A. Well, we explained to him what we had, and he made the statement.

Q. Did you tell him it would go easier on him if he made a statement?

A. It would be easier on him if he did make a statement if he was involved in it, yes.

Q. Did you tell him you might try to help him in court if he made a statement?

A. We do everything we can, because he said he had no record and never been arrested before.

Q. And you knew that was true, didn't you?

A. And he was willing to give us everything that he knew about the fire.

Q. You knew it was true that he had never been arrested before; you checked his record?

A. We checked the record, yes.

Q. You knew that he hadn't been arrested before.

A. That's right.

Q. And you told him it would go easier for him in court if he made a statement?

A. Well, we did, yes.

Q. Did you tell him that if he didn't make a statement he would be in jail for a while?

A. No, sir.

Q. Did you tell him what might happen to him if he didn't make a statement?

A. No, sir.

Q. He knew he was under arrest, didn't he?

A. Yes, he did.

Q. Did you tell him when he would be going to court?

A. I didn't tell him anything about going to court."

At the trial, again the victim of leading questions about an unspectacular remark more than a year earlier, Weiss repeated (Abst. 39; R. 423):

"Q. You told him it would go easier for him in court if he made a statement, didn't you?

A. Well, there wasn't any—

Q. The question is did you tell him it would go easier for him in court if he made a statement?

A. Yes, I did."

Moments later Weiss obtained his singular opportunity accurately to describe the opinion expressed (Abst. 41-42; R. 439):

"Q. You say you made no promises to him?

A. No, sir.

Q. But you did tell him it would go easier in court for him?

A. I did inform him if he told the truth in court it would go a lot easier.

Q. You told him if he would make a statement it would go a lot easier?

A. No, I didn't.

Q. Didn't you say that?

A. No."

His testimony at the hearing was then offered for impeachment (Abst. 42; R. 439-440).

The resultant issue is whether Robert Hartgraves, a twenty-five year old, employed father with nine years of formal education (Abst. 3; R. 8), became ". . . a person, accused or suspected of crime, to whom a policeman, a prosecutor, or an investigating agency has made a promise of immunity or leniency in return for a statement." *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 343. The established policy of Illinois is that an expression like *easier* or *better* (*People* v. *Pugh*, 409 Ill. 584, 100 N. E. 2d 909; *People* v. *Ardelean*, 368 Ill. 274, 13 N. E. 2d 976) is, standing alone, a constitutionally permissible exhortation to tell the truth. Consult III Wigmore on Evidence, § 832 (3d. ed., 1940). That policy reflects no quarrel with the critical standard not of falsity but of voluntariness (see

Stevenson v. *Boles*, 221 F. Supp. 411 [N. D. W.Va.]), but does reflect a sensitive and realistic awareness that any confessor of normal intelligence anticipates, without *any* suggestion, an improvement of his position.

The decision here further represents a finding that, although the remark of Weiss may have shortly preceded or accompanied the initial confession, the alleged influence of the remark was disputed and disproven by Hartgraves himself. Where the record dispels a causal relation between the promise and the confession, a claim of coercion is not meritorious. *Ashdown* v. *Utah*, 357 U. S. 426. Before any self-incrimination the police had informed the accused that his relatives were being questioned, for the admitted purpose of arousing his sympathy, in the death case of *Hawkins* v. *United States*, 158 F. 2d 652 (D. C. C. A.). In testifying, the accused ignored the family references *until* the prosecution explored the subject, and he eventually exaggerated the references and claimed that his confession was their product. Speaking for an unanimous court, Mr. Justice Edgerton sustained the finding of a lack of influence (at 653-654):

> ". . . The policeman's admitted purpose in making his statement to Prout is evidence, but it is not conclusive evidence, that the statement conveyed an implied threat to hold Prout's relatives. Even if such a threat was conveyed, it did not make the subsequent confession 'involuntary' unless there was a causal connection between the threat and the confession. Causal connection between some kinds of pressure and subsequent confessions is obviously probable and should be assumed. But it is not obviously probable that a man who confesses a capital crime does so in order to expedite release of relatives who are not implicated or accused, even if he has been told that this result will follow. It is less probable in the case of these appellants, one of whom had gone through high school and the other through the ninth grade, than in

> the case of an illiterate defendant. It is the more improbable because of the variety of explanations of their confessions which the appellants offered. The policeman's statement to Prout, in view of its purpose, was highly improper, but mere impropriety which has nothing to do with the making of a confession does not preclude its use."

An identical principle should control the question of a promise to Robert Hartgraves, for ". . . it is significant that no testimony to this effect was presented at the hearing on the motion to suppress." *McHenry* v. *United States*, 308 F. 2d 700, 703-704 (C. A. 10). Instead, with reflection exceeding a year, Hartgraves linked his initial choice to confess with entirely unrelated causes (Abst. 9-10; R. 84):

> "Q. When you began not telling the truth, what was your physical condition?
>
> A. Well, my arm was hurting, and I was so nervous I didn't know what to do or say, and they kept threatening me, they were going to put my little girl in a home, and they were going to take care of my wife, they'd fix it up so I didn't have to worry about the pain in my arm any more. They just kept threatening me in and out. This tall one kept coming in and said, 'Let me throw him in a cell with a bunch of crazy dope addicts.'
>
> Q. Is that why you were saying things that weren't true?
>
> A. Yes."

The issues of actual and threatened brutality, of interference with requested communications, and of an influential promise of leniency are, in short, unsupported by the record.

CONCLUSION.

The respondent respectfully contends that the record circumstances and consequent issues do not present a unique and substantial federal question and that the Petition for a Writ of Certiorari to the Supreme Court of Illinois should be denied.

Respectfully submitted,

DANIEL P. WARD,
State's Attorney of Cook County.
Criminal Court Building,
2600 South California Avenue,
Chicago, Illinois 60608,
Attorney for Respondent.

ELMER C. KISSANE,
WILLIAM J. NELLIS,
Assistant State's Attorneys.
Of Counsel.

APPENDIX A.

The pertinent text of the three ratified articles of amendment to the Constitution of the United States invoked by the petitioner is:

AMENDMENT [V]

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

AMENDMENT [VI]

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."